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crops will produce a co-tenancy in the land.[24] Thus, although one be a tenant of the land, the court may hold him a tenant in common of the crop, or (where exceptions are allowed) may give him no interest in the landlord's share of the crop; and although one be a mere cropper as to the land, he may yet enjoy a tenancy in common of the crop.

As it is thus possible to defeat the purpose of the Land Law by a technicality,[25] certain Pacific coast jurisdictions may find it necessary to pass legislation limiting the time of a cropper's term and the nature of his possession. Elsewhere the law on the subject, though in irreconcilable confusion, has fairly crystallized in each state. If a solution is desired, a statute like that of North Carolina will answer the purpose.[26]

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PUBLIC CONVENIENCE AND INJUNCTIONS AGAINST TORTS. — An Alabama decision [1] raised the disputed question whether a court may, in its discretion, withhold equitable protection to an interest which it would guard to the best of its ability in an action for legal relief, when its only reason for so doing is a balance of immediate public convenience. The court enjoined a railroad from continuing to confiscate, with compensation, a quantity of a shipper's coal, alleged to be necessary to keep trains in operation during a coal strike.

Three situations must be distinguished. (1) Clearly, courts will weigh the convenience of granting or refusing temporary relief.[2] (2) Courts will not, at the expense of more important interests, issue injunctions to protect "legal rights" of no considerable value.[3]

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[24] Harrower *v.* Heath, 19 Barb. (N. Y.) 331 (1855); Wells *v.* Hollenbeck, 37 Mich. 504 (1877) (*semble*). The point is discussed in Aiken *v.* Smith, *supra*. All the resulting difficulties as to enforcement of rights between the tenants in common before division and during and after delivery, and between each or both of them and third persons are incidental to the law of common property and have no place in the present discussion. See 2 TIFFANY, LANDLORD AND TENANT, 1665.

[25] The object of the contract in the principal case was clearly to allow the alien all the privileges of a tenant for years, while preserving in form the appearance of a cropper's agreement.

[26] State *v.* Austen, 123 N. C. 749, 31 S. E. 731 (1899), decided under 1905 N. C. CODE, § 1993, where it is provided that all crops raised by a tenant or cropper, in the absence of any contrary agreement, shall be vested in the landlord until payment has been made of rent or advances. See also 1911 GA. CODE, § 3705.

[1] Mobile & Ohio R. R. Co. *v.* Zimmern, 89 So., 206 Ala. 37, 89 So. 475, (1921). For the facts of this case, see RECENT CASES, *infra*, p. 223. For discussions of the same decision, see 31 YALE L. J. 330; 16 A. L. R. 1352.

[2] Beidenkopf *v.* Des Moines Life Ins. Co., 160 Ia. 629, 142 N. W. 434 (1913); Jones *v.* Lassiter, 169 N. C. 750, 86 S. E. 710 (1915).

[3] McCann *v.* Chasm Power Co., 211 N. Y. 301, 105 N. E. 416 (1914); Frost *v.* Los Angeles, 181 Cal. 22, 183 Pac. 342 (1919). Similarly, when there is an appropriation by a public utility with power of eminent domain to condemn what is appropriated, an injunction should be denied, on the giving of security to pay the value of the property. See Zechariah Chafee, Jr., "The Progress of the Law, 1919–1920. Equitable Relief against Torts," 34 HARV. L. REV.

(3) A permanent injunction to protect a valuable "legal right" against a wrong which equity would ordinarily enjoin may promise greater immediate general hardship than benefit.

In this last situation some courts have denied relief.[4] It is arguable, that a rule ought not to restrict the chancellor, but that a flexible standard should guide him. He should deny specific relief when, in a given situation, granting it would produce immediate general harm out of proportion to good.

Decisions on nuisances are the strongest authorities for this position.[5] They do not, however, even if they are correct, warrant the application of such a standard to suits for injunctions against other torts.[6] A nuisance is an interference with the use of property, not a deprivation of property. The courts balance interests in determining the very existence of a nuisance, and are led naturally to continue this method in deciding on an injunction.[7] Furthermore, the creator of a nuisance is usually not a deliberate wrongdoer.[8] Opinions on

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388, 394–395. The dissent in McCann *v.* Chasm Power Co., *supra*, raises a serious doubt whether the *ratio decidendi* was properly applied.

[4] Richards's Appeal, 57 Pa. St. 105 (1868); Fox *v.* Holcomb, 32 Mich. 494 (1875); Simmons *v.* Mayor of Paterson, 60 N. J. Eq. 385, 45 Atl. 995 (1900); Mountain Copper Co. *v.* United States, 142 Fed. 625 (9th Circ., 1906); McCarthy *v.* Bunker Hill Mining Co., 147 Fed. 981, aff'd, 164 Fed. 927 (9th Circ., 1908), *certiorari* denied, 212 U. S. 583; Bliss *v.* Anaconda Copper Mining Co., 167 Fed. 342, aff'd, as Bliss *v.* Washoe Copper Co., 186 Fed. 789 (9th Circ., 1911), *certiorari* denied, 231 U. S. 764; Booth-Kelly Lumber Co. *v.* Eugene, 67 Ore. 381, 163 Pac. 29 (1913); Haggerty *v.* Latreille, 14 D. L. R. 532, 29 Ont. L. R. 300 (1913); City of Wheeling *v.* Natural Gas Co., 74 W. Va. 372, 82 S. E. 345 (1914). See 1 AMES, CASES IN EQUITY JURISDICTION, 578 n; KERR, INJUNCTIONS, 5 ed., 32–35; LINDLEY, MINES, 3 ed., 2075–2090. See G. B. Slaymaker, "The Rule of Comparative Injury in the Law of Injunction," 60 CENT. L. J. 23. See also 28 HARV. L. REV. 110. The fundamental reason for these decisions is a consideration of general convenience, and not the convenience of the defendant. It will hardly be contended that hardship to a defendant, alone, ought to be a defense to a suit for an injunction against a tort that is not merely technically such. Wente *v.* Commonwealth Fuel Co., 232 Ill. 526, 83 N. E. 1049 (1908). Broad references to policy are very common in judgments refusing relief on other grounds, legal or equitable. New York City *v.* Pine, 185 U. S. 93 (1902); Johnson *v.* United Rys., 227 Mo. 423, 127 S. W. 63 (1910). Indeed, most of the cases cited above are open to acute differentiating criticism.

In a few states, statutes give some authority for the exercise of equitable discretion of the character proposed. See 1912 COLO. ANN. STAT., § 3241; 1914 PARK ANN. CODE GA., § 5497; 1918 ANN. CODE TENN., § 5158. It has been held that a statute authorizing a chancellor to give damages when he denied specific relief, did not authorize a balancing of convenience. Shelfer *v.* City of London Electric Lighting Co., [1895] 1 Ch. 287. *Cf.* Chadwick *v.* City of Toronto, 32 Ont. L. R. 111 (1914).

[5] Richards's Appeal, *supra*; Grey *v.* Mayor of Paterson, *supra*; Mountain Copper Co. *v.* United States, *supra*; McCarthy *v.* Bunker Hill Mining Co., *supra*; Bliss *v.* Anaconda Copper Mining Co., *supra*. See 7 VA. L. REV. 661.

[6] Bliss *v.* Anaconda Copper Mining Co., *supra*.

[7] In McCarthy *v.* Bunker Hill Mining Co., *supra*, and Bliss *v.* Anaconda Copper Mining Co., *supra*, the Circuit Court of Appeals, in affirming the decisions of the lower courts, was careful to point out that there was some doubt whether the defendants had created real nuisances.

[8] It is arguable that a fairly accurate estimate of damages usually provides an adequate remedy for a nuisance. Richards's Appeal, *supra*; Osborne *v.*

suits for specific performance, also, lend some support to the proposed theory. In such cases courts have considered hardship to defendants,[9] to specific third parties,[10] to the public.[11] Public convenience alone, however, in those cases where courts have referred to it, has not controlled the decisions.[12] An equally important factor has usually been adequacy of the legal remedy,[13] a traditional reluctance to supervise complex affirmative action,[14] or hardship to specific individuals.[15] Further, decisions on contracts should not be conclusive in tort cases, where equity may well feel the peculiar importance of protecting security and possession.

The view that immediate public convenience should determine rights to equitable relief rests on a conception of equity as a peculiar system of executive justice. Such a conception is inconsistent with contemporary legal theory. The tendency to-day seems to be toward an assimilation of law and equity into a single system of regulation, employing, in reaching decisions, a common method.[16] Thus there is a strong line of authorities holding that an injunction ought to issue in situations similar to the principal case, whether of nuisances

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Mo., Pac. Ry. Co., 147 U. S. 248 (1893); Bliss *v.* Anaconda Copper Mining Co., *supra.*

[9] Bochterle *v.* Saunders, 36 R. I. 39, 88 Atl. 803 (1913); Nelson *v.* Robinson, 178 N. W. 416 (Ia., 1920). This ground of defense is often coupled with other equitable defenses. Pasco Fruit Lands Co. *v.* Zimmerman, 88 Wash. 112, 152 Pac. 675 (1915), (fraud); Lexington & E. Ry. Co. *v.* Williams, 183 Ky. 343, 209 S. W. 59 (1919), (mistake); Babcock *v.* Engel, 194 Pac. 137 (Mont. 1920), (plaintiff's default). *Cf.* Compton *v.* Weber, 296 Ill. 412, 129 N. E. 764 1921), (defendant's trick causing plaintiff's default unavailing).

[10] Curran *v.* Holyoke Water Power Co., 116 Mass. 90 (1874); Elliott *v.* Loucks, 187 N. W. 689 (Ia., 1922).

[11] Chicago & Alton R. R. Co. *v.* Schoeneman, 90 Ill. 258 (1878); Conger *v.* The New York, West Shore & Buffalo R. R. Co., 120 N. Y. 29, 23 N. E. 983 (1890); Herzog *v.* Atchison, 153 Cal. 496, 95 Pac. 898 (1908); Whalen *v.* Baltimore & Ohio R. R. Co., 108 Md. 11, 69 Atl. 390 (1908). Cases in which contracts are held against public policy are to be distinguished; though it may be that they furnish a more rational basis for the same result. Ford *v.* Oregon Electric Ry. Co., 60 Ore. 278, 117 Pac. 809 (1911). The defendant's status as a public utility should be immaterial. Herzog *v.* Atchison, *supra. Cf.* Conger *v.* The New York, West Shore & Buffalo R. R. Co., *supra*; Whalen *v.* Baltimore & Ohio R. R. Co., *supra.*

[12] Fox *v.* Spokane International Ry. Co., 26 Ida. 60, 140 Pac. 1103 (1914). See Driver *v.* Smith, 89 N. J. Eq. 339, 343-347, 104 Atl. 717, 719-720 (1918).

[13] Chicago & Alton R. R. Co *v.* Schoeneman, *supra*; Texas & Pacific Ry. Co. *v.* Marshall, 136 U. S. 393 (1890); Conger *v.* The New York, West Shore & Buffalo R. R. Co., *supra. Cf.* Clarke *v.* Aiken, 276 Fed. 21 (5th Circ., 1921).

[14] Texas & Pacific Ry. Co. *v.* Marshall, *supra*; York Haven Water & Power Co. *v.* York Haven Paper Co., 201 Fed. 270 (3rd Circ., 1912).

[15] Chicago & Alton R. R. Co. *v.* Schoeneman, *supra*; Coe *v.* New Jersey Midland Ry. Co., 31 N. J. Eq. 105 (1879); Herzog *v.* Atchison, *supra*; Linthicum *v.* Washington, B. & A. Elect. R. R. Co., 124 Md. 263, 92 Atl. 917 (1915). If Whalen *v.* Baltimore & Ohio R. R. Co., *supra*, cannot be explained on any of these grounds, the decision, it is submitted, is clearly open to criticism. The use of a flexible discretionary standard in refusing specific performance on grounds of public convenience is subject to most of the objections urged against such a standard in tort cases. Fox *v.* Spokane International Ry. Co., *supra*; Driver *v.* Smith, *supra.*

[16] See Roscoe Pound, "The Decadence of Equity," 5 COL. L. REV. 20; Wesley N. Hohfeld, "The Relations between Equity and Law," 11 MICH. L. REV. 537.

or other torts.[17] These authorities are consistent with that sound policy of the law which refuses to consider immediate general need a justification for aggression by an interested party, in breaking the regulations which law courts ordinarily enforce for the protection of life and property.[18] The characteristic feature of equity is that it gives relief because the law affords no sufficient protection to the interests it recognizes as worthy of protection.[19] The force of this

[17] Broadbent *v.* Imperial Gas Co., 7 De G. M. & G. 436 (1856), 7 H. L. C. 600 (1859); Shelfer *v.* City of London Electric Lighting Co., *supra*; Wood *v.* Conway Corporation, [1914] 2 Ch. 47. See Francis H. Bohlen, "The Rule in Rylands *v.* Fletcher," 59 U. PA. L. REV. 298, *et seq.* Professor Bohlen discusses the English point of view in an analogous situation where the interests of an ancient land holding class are protected against the claims of a new manufacturing class; and compares it with an early American tendency to favor the claims of manufacturers. He is interested in a solution whereby the costs of industrial progress may be shifted, through the manufacturers, to the community. In words applicable to the present problem he says, p. 445 n., "To throw the risk of a business essential to the public interests upon a particular individual who derives no special benefit therefrom, simply because the exercise of his rights brings him within reach of its injurious effects, is not essentially different from the conduct of a Sultan of Morocco, who, in order to raise funds for the carrying on of a war, confiscates the property of the nearest rich man."

The federal courts have taken the different views. Strong *dicta* in Georgia *v.* Tennessee Copper Co., 206 U. S. 230 (1907), and the decision in American Smelting and Refining Co. *v.* Godfrey, 158 Fed. 225 (8th Circ., 1907), support the principal case. Mountain Copper Co. *v.* United States, *supra*; McCarthy *v.* Bunker Hill Mining Co., *supra*; and Bliss *v.* Anaconda Copper Mining Co., *supra*, are usually cited as *contra*. In none of these cases, however, was it clear that the defendants were maintaining real nuisances. In New York the earlier cases were in agreement with the principal case. Cogswell *v.* N. Y., N. H., & H., R. R. Co., 103 N. Y. 10, 8 N. E. 537 (1886); Whalen *v.* The Union Bag and Paper Co., 208 N. Y. 1, 101 N. E. 805 (1913). McCann *v.* Chasm Power Co., *supra*, casts some doubt on these decisions; but it may best be explained as suggested above. In Pennsylvania, Sullivan *v.* Jones & Laughlin Steel Co., 208 Pa. St. 540, 57 Atl. 1065 (1904), has changed the law of Richards's Appeal, *supra*. The law of New Jersey is now in accord with the principal case. Hennessey *v.* Carmony, 50 N. J. Eq. 616, 25 Atl. 374 (1892); Rowland *v.* N. Y. Stable Manure Co., 88 N. J. Eq. 168, 101 Atl. 521 (1917). *Cf.* Simmons *v.* Mayor of Paterson, *supra*. Longton *v.* Stedman, 182 Mich. 405, 148 N. W. 738 (1914), weakens considerably Fox *v.* Holcomb, *supra*.

*Accord*, also, are Wente *v.* Commonwealth Fuel Co., *supra* (Ill.); Hulbert *v.* California Portland Cement Co., 161 Cal. 239, 118 Pac. 928 (1911); Szathmary *v.* B. & A. R. R. Co., 214 Mass. 42, 100 N. E. 1107 (1913); State Board of Tax Commissioners *v.* Belt R. R. & Stockyards Co., 130 N. E. 641 (Ind. 1921). See 1 AMES, CASES IN EQUITY JURISDICTION, 585 n. POMEROY, EQUITY JURISDICTION, 4 ed., § 1922. See also 22 HARV. L. REV. 596.

It has been held that another rule would be unconstitutional. Stark *v.* Coe, 134 S. W. 373 (Tex. App., 1911.) *Cf.* Driver *v.* Smith, *supra*. *Sed quære.*

For examples of the way in which injunction decrees may be moulded to avoid imposing undue hardship, see City of Grand Rapids *v.* Weiden, 97 Mich. 82, 56 N. W. 233 (1893); Attorney General *v.* Birmingham Dist. Drain. Bd., [1912] A. C. 788; Arizona Copper Co. *v.* Gillespie, 230 U. S. 46 (1913); Stollmeyer *v.* Petroleum Development Co., Ltd., [1918] A. C. 498.

[18] Regina *v.* Dudley, 15 Cox C. C. 624, 14 Q.B.D. 273 (1884); People *v.* Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735 (1890); Roth Coal Co. *v.* Louisville & N. R. R. Co., 142 Tenn. 52, 215 S. W. 404 (1919). For the strictly "legal" aspects of the principal case, see 16 A. L. R. 1352.

[19] The view that no adequate remedy is given by repeated and troublesome actions at law against a single trespasser is well supported and sound. Cragg

reason is not weakened by the fact that in a particular case the protection of such an interest may lead to immediate public hardship.

Vagueness in the proposed standard would prevent the realization, in an important field, of the advantages of a system of precedents as checks on judicial idiosyncrasies. Its uncertainty would destroy predicability.[20] Further, it is a most important object of the law to-day to secure individuals in the use and control of their property. In an extraordinary crisis a court or an executive [21] ought perhaps, to disregard, the policy of effecting this object. The rule, however, should be that equity and law combine, where possible, to protect the same interests. The chancellor cannot, any more than the judge, follow his "conscience" [22] to the disregarding of these interests. The extraordinary crisis ought to be left until it arises, an unprecedented case. In the meantime the legislature, within constitutional limits, may make any changes in the law of property which it deems wise.[23]

This view, that the chancellor, with jurisdiction, ought not to have discretion to disregard the important interest in protecting "legal rights" on the ground of immediate public convenience, may seem too radical a departure from the traditional theory of equity's discretion. What is practically the same conclusion may be stated in language more consistent with traditional conceptions. It may be said that the chancellor, with jurisdiction, having discretion, ought to exercise his discretion in such a way as to serve the interest in protecting clear "legal rights," regardless of immediate general convenience.[24]

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*v.* Levinson, 238 Ill. 69, 87 N. E. 121 (1908); Wilson & Son *v.* Harrisburg, 107 Me. 207, 77 Atl. 787 (1910); Johnson *v.* Burghorn, 179 N. W. 225 (Mich., 1920); Stroup *v.* Hubbell Co., 192 Pac. 519 (N. Mex., 1920). The older rule in Alabama was that repeated trespasses would be enjoined, as such, only when committed by several people. Deegan *v.* Neville, 127 Ala. 471, 29 So. 173 (1900). That view is now repudiated. Tidwell *v.* Hitt Lumber Co., 198 Ala. 236, 73 So. 486 (1916).

[20] On these points, see: BLACK, JUDICIAL PRECEDENTS, 2–9, 24–36, 182–189; CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 9–30, 51–64, 142–167; POUND, READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW, 2 ed., 227–252; WAMBAUGH, THE STUDY OF CASES, 2 ed., 95–109.

[21] The King's Prerogative in Saltpetre, 12 Co. 12. See BEALE, CASES ON LEGAL LIABILITY, 2 ed., 464–465.

[22] See SINGER, THE TABLE-TALK OF JOHN SELDEN, 148–149. See also, POUND, *op. cit.* 162–164, 170

[23] A statute allowing summary appropriations in situations like that involved in the principal case, would probably not violate the Alabama constitution, § 23; though it provides that payment is to be made in advance for property taken for a public purpose. A similar provision has been held complied with where security for payment was given in advance. Columbus & Western Ry. Co. *v.* Witherow, 82 Ala. 190, 3 So. 23 (1886). *Cf.* Southern Ry. Co. *v.* Birmingham, etc. Ry. Co., 130 Ala. 660, 31 So. 509 (1901). Such a statute would almost certainly be valid under the Federal Constitution. Cherokee Nation *v.* Kansas Ry. Co., 135 U. S. 641 (1890); *In re* Condemnation for Improvement of Rouge River, 266 Fed. 105 (E. D. Mich. 1920). *Cf.* Brickett *v.* Haverhill Aqueduct Co., 142 Mass. 394, 8 N. E. 119 (1886). See NICHOLS, POWER OF EMINENT DOMAIN, 2 ed., 631.

[24] Lord Eldon said in Gee *v.* Pritchard, 2 Swanst. 402 (1818), "The doctrines of this court ought to be as well settled, and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case." The strong "almost" marks, perhaps, the slight difference between the two views just compared.